STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS LIGHT COMPANY	**)**	
D/B/A Ameren/CILCO	**)**	
	)	**No. 05-0160**
Proposal to implement a competitive procurement	**)**	
Process by establishing Rider BGS, Rider BGS-L,	**)**	
Rider RTP, Rider RTP-L, Rider D, and Rider MV	**)**	
	)	
CENTRAL ILLIONOIS PUBLIC SERVICE COMPANY	**)**	
d/b/a AmerenCIPS	**)**	
	)	**No. 05-0161**
Proposal to implement a competitive procurement	**)**	
Process by establishing Rider BGS, Rider BGS-L,	**)**	
Rider RTP, Rider RTP-L, Rider D, and Rider MV	**)**	
	)	
ILLINOIS POWER COMPANY	**)**	
d/b/a AmerenIP	**)**	
	)	**No. 05-0162**
Proposal to implement a competitive procurement	**)**	
Process by establishing Rider BGS, Rider BGS-L,	**)**	
Rider RTP, Rider RTP-L, Rider D, and Rider MV	**)**	

PETITION FOR INTERLOCUTORY REVIEW
BY THE PEOPLE OF THE STATE OF ILLINOIS,
THE CITIZENS UTILITY BOARD, AND
THE ENVIRONMENTAL LAW AND POLICY CENTER

Pursuant to 83 Ill. Admin. Code Section 200.520, the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois; the Citizens Utility Board and the Environmental Law and Policy Center, by and through their attorneys, hereby petition the Illinois Commerce Commission ("Commission" or "ICC") for interlocutory review of the June 1, 2005 Administrative Law Judges' Rulings ("ALJ Rulings") denying our Motions to Dismiss ("Motion").

The Motions sought to dismiss Commonwealth Edison's and the Ameren Companies' (collectively, "the utilities") requests for approval of Riders CPP, BGS, BGS-L, D and MV ("the Riders") on the grounds that the Commission does not have legal authority to approve market-based rates for electric service that has not been declared competitive pursuant to Section 16–113 of the Public Utilities Act ("PUA"). *220 ILCS 5/16-113.* For the reasons explained below, the ALJ Rulings contain errors of law and should, therefore, be reversed by the Commission.

Summary of the Argument

Section 16-103(c) of the PUA authorizes market-based rates *only* for service that has been declared competitive pursuant to Section 16-113. *220 ILCS 5/16-103(c) and 5/16-113.* There is no language in the PUA that authorizes market-based rates for customers who do not have access to electric service that has been declared competitive. This is a bright line standard: a service either has been declared competitive or it hasn't -- and market-based rates *cannot* be charged for services that have not been declared competitive.

Our Petition for Interlocutory Review focuses on the ALJs' misinterpretation of Section 16-103(c) of the PUA. The ALJs conclude that:

> . . . just because that particular method is statutorily mandated for establishing certain cost components for competitive services does not somehow mean it is statutorily prohibited for other services or customers, particularly where, as in the instant case, use of market-based prices is expressly recognized as one means of establishing costs in Section 16-103(c).

ALJ Rulings at 6 (ComEd) and 7 (Ameren). This interpretation is contrary to the plain language of 16-103(c) and violates basic rules of statutory construction.

The Riders proposed by the utilities include market-based rates[1], which would automatically pass through prices determined through an auction and would shift risk associated with the market from the utilities to their customers. None of the customer groups covered under the proposed Riders take electric service that has been or could be declared competitive pursuant to Section 16-113 of the PUA. The millions of residential, commercial and industrial customers affected by these Riders are served exclusively by their regulated utility. These consumers have not experienced the "choices among suppliers and services" or "benefits" of competition that were mentioned in the 1997 Amendments to the PUA.[2] It is both illegal and illogical to expose these customers, who have no competitive choices, to market prices.

Captive customers would lose most (perhaps all) of the consumer protections afforded by the PUA if their rates were set automatically by the market, rather than through a process of regulatory review by the Commission. This is a lot to lose. Unlike the Commission, markets are not required to

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[1] There is no dispute as to whether the rates proposed in the riders are market-based rates. Indeed, several utility witnesses confirm that the auctions proposed in the Riders are designed to bring market-based rates to their retail customers. Frank Clark, Exelon Corporation Executive Vice President and Chief of Staff and Commonwealth Edison's President, testifies that "[T]he auction design . . . is an accepted and proven process for bringing the benefits of market-based rates to customers." *ComEd Ex.1.0, p. 20.* Exelon Vice-President Betsey Moler states that " . . . customers . . . would be paying prices determined by the operation of the wholesale market." *Moler (ComEd Ex. 2.0) at 4, lines 79-83.* Similarly, Ameren witness Pfeifenberger states that the proposed auction
". . . provides stable but *market-based* rates." (Ameren Ex 7.0) p. 4 (82-88). Warner L. Baxter, Executive Vice President and Chief Financial Officer for Ameren Corporation opines that ". . . rates <u>should</u> reflect market prices." *Amere Ex.1.0, p. 3; emphasis added.*

[2] The1997 Amendments to the PUA state that: "<u>All consumers must benefit</u> in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition and receive sufficient information to make informed <u>choices among suppliers and services</u>." *220 ILCS 5/16-101A(e), emphasis added.*

consider the prudence of management decisions, excess profits, citizens' right to be heard, the justness and reasonableness of rates, the credibility and weight of evidence, or ethical problems. Unlike the Commission, markets are not required to ensure that the People of Illinois have access to "adequate, efficient, reliable, environmentally safe and least-cost public utility services *at prices which accurately reflect the long-term cost of such services* and which are equitable to all citizens." *220 ILCS 5/1-102, emphasis added.*

The Commission should reject the ALJ's erroneous interpretation of Section 16-103(c), reverse the ALJ Rulings denying the Motions to Dismiss, and dismiss the utilities' requests for approval of the Riders because the Riders would impose market-based rates on customers who do not have access to service that has been declared competitive. These Riders must be rejected, as a matter of law. The Commission does not have authority to subject captive customers to rates automatically passed through from the market. Captive customers are entitled to rates determined through a regulatory review process that balances the public's right to pay no more than the reasonable value for electric service and the utility's right to a fair, but not excessive, rate of return.

Background

On February 25, 2005, Commonwealth Edison filed[3] several tariffs, including Rider CPP, with the Commission. Rider CPP describes an auction process that would be used, starting in 2007, to procure and price electricity for

[3] A "Supplemental Statement" filed in connection with the tariffs states that "ComEd is filing these tariffs pursuant to Article IX and Sections 16-108, 16-109A, 16-111 and 16-112 of the [Public Utilities] Act." *Supplemental Statement, ICC Docket No. 05-0159 (February 25, 2005) at 4.*

the 3.6 million residential, commercial, and industrial (less than 3 MW) customers in the Commonwealth Edison service territory.

On February 28, 2005, the Ameren Companies filed[4] several tariffs, including Riders BGS, BGS-L, D and MV, with the Commission. Riders BGS, BGS-L, D and MV describe an auction process that would be used, starting in 2007, to procure and price electricity for over one million residential, commercial and industrial customers in the Ameren Companies' service territory.

On March 9, 2005, the ICC opened docket 05-0159 to investigate "the propriety of the proposed tariff sheets" and suspended Rider CPP, as well as the other tariffs proposed by Commonwealth Edison. *Suspension Order, ICC Docket No. 05-0159, March 9, 2005.*

On March 9, 2005, the Commission also opened docket nos. 05-0160, 05-0161 and 05-0162 to investigate "the propriety of the proposed tariff sheets" and suspended Riders BGS, BGS-L, D and MV, as well as the other tariffs proposed by the Ameren Companies. *Suspension Order, ICC Docket No. 05-0160, Suspension Order, ICC Docket No. 05-0161, Suspension Order, ICC Docket No. 05-0162, March 9, 2005.*

On May 17, 2005, Motions to Dismiss the utilities' requests for approval of the Riders were filed by the People of the State of Illinois, the Cook County State's Attorney's Office[5], the Citizens Utility Board and the Environmental Law

[4] A "Supplemental Statement" filed in connection with the tariffs states that they were "filed pursuant to Article IX, just as envisioned by the statute." *Supplemental Statement, ICC Docket nos. 05-0160, 05-0161, 05-0162 (February 28, 2005) at 6.*

[5] The Cook County State's Attorney's Office co-sponsored the Motion to Dismiss only in Docket No. 05-0159.

and Policy Center. The Motions were filed in docket nos. 05-0159, 05-0160, 05-0161, and 05-0162.

On May 25, 2005, the following parties filed Responses to the Motions: ComEd and the Ameren Companies, the Building Owners and Managers Association of Chicago ("BOMA"); Local Unions 15, 51, and 702 of the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW"); the Staff of the Illinois Commerce Commission ("Staff"); and electricity suppliers Midwest Generation EME, LLC; Constellation NewEnergy, Inc.; MidAmerican Energy Company; Peoples Energy Services Corporation, U.S. Energy Savings Corporation, Electric Power Supply Association, Midwest Independent Power Suppliers, and the Illinois Energy Association (collectively, "the suppliers").

On May 31, 2005, Replies in support of the motions to dismiss were filed by the People of the State of Illinois, the Cook County State's Attorney's Office[6], the Citizens Utility Board and the Environmental Law and Policy Center.

On June 1, 2005, identical ALJ Rulings were issued in docket no. 05-0159 and in docket nos. 05-0160/05-0161/05-0162 (cons.) denying the Motions to Dismiss the utilities' requests for approval of the Riders.

Today, we ask the Commission to: (1) reject the ALJs' erroneous interpretation of Section 16-103(c) of the PUA; (2) reverse the ALJ Rulings denying the Motions to Dismiss; and (3) dismiss the utilities' requests for approval of these unlawful Riders.

[6] The Cook County State's Attorney's Office co-sponsored the Reply in support of the motions to dismiss only in Docket No. 05-0159.

ARGUMENT

I. The ALJ Rulings should be reversed because they fundamentally misinterpret Section 16-103(c) of the PUA.

Section 16 -103(c) of the PUA expressly mandates the use of market Based prices to establish the cost of electric service that has been declared competitive[7] pursuant to Section 16-113 of the PUA:

> Upon declaration of the provision of electric power and energy as competitive, the electric utility shall continue to offer to such customers, as a tariffed service, bundled service options at rates which reflect recovery of all cost components for providing the service. *For those components of the service which have been declared competitive, cost shall be the market based prices.* Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.

220 ILCS 5/16-103(c), emphasis added. At present, only very large (over 3 megawatt) commercial and industrial customers in Commonwealth Edison's service territory receive service that has been declared competitive.[8]

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[7] The competitive declaration provision was enacted as part of the 1997 Amendments to the PUA and provides in part that:

> The Commission shall declare the service to be a competitive service for some identifiable customer segment or group of customers, or some clearly defined geographical area within the electric utility's service area, if the service or a reasonably equivalent substitute service is reasonably available to the customer segment or group in the defined geographical area at a comparable price from one or more providers other than the electric utility or an affiliate of the electric utility, and the electric utility has lost or there is a reasonable likelihood that the electric utility will lose business for the service to the other provider or providers . . .

P.A. 90-561 § 113(a), codified at 220 ILCS 5/16-113(a).

[8] *Commonwealth Edison Company Petition for declaration of service currently provided under Rate 6L to 3 MW and greater customers as a competitive service pursuant to Section 16-113 of the Public Utilities Act and approval of related tariff amendments, ICC docket no. 02-0479; March 28, 2003; reh'g denied, April 28, 2003; aff'd, March 24, 2004 (Ill App Nos. 1-03-0263 and 1-03-1706 (cons)).*

Section 16-103(c) PUA also specifically states that customers that do not have access to service that has been "declared competitive" are entitled to continue receiving the same service that was offered before the 1997 PUA Amendments[9] were enacted:

> [E]ach electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997.

220 ILCS 5/16-103(c). There is no language in the PUA that authorizes market-based rates for customers who do not have access to electric service that has been declared competitive.

The ALJ Rulings fundamentally misinterpret Section 16-103(c) of the PUA. They ignore the dichotomy set forth in this section, which distinguishes between customers who take service that has been declared competitive pursuant to Section 16-113 and customers who do not have access to service that has been declared competitive. The ALJs conclude that:

> . . . just because that particular method is statutorily mandated for establishing certain cost components for competitive services does not somehow mean it is statutorily prohibited for other services or customers, particularly where, as in the instant case, use of market-based prices is expressly recognized as one means of establishing costs in Section 16-103(c).

ALJ Rulings at 6 (ComEd) and 7 (Ameren). This conclusion is clearly contrary to the plain language of Section 16-103(c) and basic rules of statutory construction.

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[9] In 1997, the Public Utilities Act was amended by the "Electric Service Customer Choice and Rate Relief Act Law of 1997." *P.A. 90-561, codified at 220 ILCS 5/16.*

A. The ALJs' interpretation of Section 103(c) is contrary to the plain language in this section and contrary to basic rules of statutory construction.

The ALJ Rulings do not cite any statutes, cases, or rules of statutory construction to support of the conclusion that market-based rates can be charged to all customers – whether or not they have access to service that has been declared competitive. Indeed, the ALJs' use of the phrase "just because" appears to be the only explanation offered. The ALJ Rulings do not examine or even acknowledge the statutory construction analyses, presented in the Motion and the Reply in support of the Motion, which demonstrate that Section 16-103(c) authorizes market-based rates only for service that has been declared competitive.

1. The plain language of Section 16-103(c) authorizes market-based rates only for electric service that has been declared competitive.

The construction of a statute is a question of law. *In re Estate of Dierkes,* 191 Ill.2d 326, 330, 246 Ill.Dec. 636, 730 N.E.2d 1101 (2000). The cardinal rule of statutory interpretation, to which all other rules are subordinate, is to ascertain and give effect to the intent of the legislature. *People v. Maggette,* 195 Ill.2d 336, 348, 254 Ill.Dec. 299, 747 N.E.2d 339 (2001). The best indication of legislative intent is the statutory language, given its plain meaning. *Illinois Graphics Co. v. Nickum,* 159 Ill.2d 469, 479, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994).

Section 16-103(c) provides that customers are entitled to continue receiving the same service that was offered before the 1997 amendments – at

least until such time as their service is declared competitive. The last three sentences expressly authorize the use of "market based prices" to determine the costs which a utility is entitled to recover in rates charged for services that have been declared competitive. This section does *not* authorize the use of "market based prices" to determine the costs that a utility can recover for services that have *not* been declared competitive pursuant to Section 16-113 of the PUA – nor is there any other language in the PUA to that effect.

The interpretation of Section 16-103(c) presented in the ALJ Rulings expands the reach of this section to authorize use of "market-based prices" to set rates for customers who do not have access to service that has been declared competitive. This is contrary to the plain language of the four sentences in Section 16-103(c). This approach is also contrary to judicial precedent which makes clear that:

> Under the guise of construction, a court may not supply omissions, remedy defects, annex new provisions, substitute different provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of language employed in the statute . . . *(Citation Omitted). King v. First Capital Financial Services Corp., ---Ill.2d ---, 2005 WL 913512, 2005 Ill. LEXIS 623, *32-33 (2005).*

The ALJs effectively "annex new provisions . . . [that] depart from the plain meaning of language employed in the statute" when they conclude that the PUA authorizes market-based rates for service that has not been declared competitive.

2. The General Assembly's use of express language, in 16-103(c), to specifically authorize market-based rates for service that has been declared competitive necessarily excludes the possibility that the General Assembly intended to authorize market-based rates for service that has not been declared competitive.

One rule of statutory construction that is clearly applicable in this case is summed up in the maxim e*xpressio unis est exclusion alterius (i.e.,* to express or include one thing implies the exclusion of the other, or of the alternative.) *Black's Law Dictionary 620 (8th ed.2004).* The Illinois Supreme Court notes that:

> This rule of statutory construction is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written. 2A N. Singer, Sutherland on Statutory Construction § 47.24, at 228,
> § 47.25, at 234 (5th ed.1992).

Metzger v. DaRosa, 209 Ill.2d 30, 44, 282 Ill.Dec. 148, 805 N.E.2d 1165 (2004).

Applying this rule of statutory construction to Section 16-103(c) makes clear that this section authorizes "market based prices" only for service that has been declared competitive. The General Assembly's use of express language, in Section 16-103(c), to specifically authorize market-based rates for service that has been declared competitive indicates that the General Assembly intended to authorize market-based rates for service that has been declared competitive, but not for service that has not been declared competitive.

The ALJs' interpretation of Section 16-103(c) suggests that when the General Assembly expressly authorized market-based rates for service that has been declared competitive, that the General Assembly actually intended to authorize market-based rates for service that has not been declared competitive,

as well. This interpretation ignores the "learning of common experience that when people say one thing they do not mean something else." *Metzger v. DaRosa at 44.* The ALJs' interpretation of Section 16-103(c) defies logic and common sense and, as noted above, it is clearly contrary to a rule of statutory construction recently endorsed by the Illinois Supreme Court. When the rules of statutory construction and Illinois Supreme Court precedent are used to interpret Section 16-103(c), it is clear that this section authorizes market-based rates only for service that has been declared competitive.

3. The ALJs' construction of Section 16-103(c) must be rejected because it renders meaningless key phrases in this section.

The sentences in Section 16-103(c) that authorize market-based rates begin with the phrases "Upon declaration of the provision of electric power and energy as competitive . . ." and "For those components of the service which have been declared competitive . . ." The ALJs' interpretation of Section 16-103(c) assumes that these phrases have no meaning:

> . . . just because a particular method is statutorily mandated for establishing certain cost components for competitive services does not somehow mean it is statutorily prohibited for other services or customers.

ALJ Rulings at 6 (ComEd) and 7 (Ameren).

This approach ignores extensive case law in which the Illinois courts have soundly rejected constructions of statutes, including the PUA, that render words or phrases superfluous. *See, Commonwealth Edison Co. v. Illinois Commerce Com'n 332 Ill.App.3d 1038, 1051, 266 Ill.Dec. 551, 775 N.E.2d 113, (2 Dist., 2002) citing A.P. Properties, Inc. v. Goshinsky, 186 Ill.2d 524, 532, 239 Ill.Dec.*

600, 714 N.E.2d 519 (1999) (statute must be construed so that each word, clause, and sentence is given a reasonable meaning and not rendered superfluous).

Section 16-103(c) must be read to authorize market-based ratemaking solely for service that has been declared competitive. Any other interpretation would render meaningless the phrases "Upon declaration of the provision of electric power and energy as competitive . . ." and "For those components of the service which have been declared competitive . . ." The ALJs' reading of Section 16-103(c), which attempts to explain away these key phrases, is contrary to established precedent and should be rejected.

B. The ALJ Rulings ignore important consumer protections in the PUA that have been in place for almost a century and which the 1997 PUA Amendments expressly retained for service that has not been declared competitive.

"The two principal institutions of social control in a private enterprise economy are competition and direct regulation."[10] During the late nineteenth century, economic regulation developed to control markets in which unrestrained competition failed to operate as a "self-generating regulatory force."[11] Economic regulation was proposed when a lack of genuine competition resulted in unequal and unfair relationships between consumers and producers.[12]

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[10] Economics of Regulation: Principles and Institutions, Alfred E. Kahn (John Wiley & Sons, Inc. 1971), at xiii.

[11] American Capitalism, John Kenneth Galbraith (Boston: Houghton Mifflin, 1952), at 112 – 113.

[12] "Theories of Economic Regulation," Bell Journal of Economics and Management Science, 5, no. 2 (Autumn 1974): 335.

In 1873, Illinois became the first state in the nation to regulate public utility rates.[13] Four years later, the U.S. Supreme Court upheld the Illinois General Assembly's power to regulate rates charged by enterprises "affected with a public interest", thereby establishing the constitutionality of state regulation of public utilities. *Munn v. Illinois, 94 U.S. 113, 126; 24 L.Ed. 77 (1877).* Since then, the General Assembly has played an active role in the regulation of public utilities in Illinois – enacting and repeatedly amending the PUA[14] to rigorously fine-tune the statute so that "public utilities shall continue to be regulated effectively and comprehensively." *220 ILCS 5/1-102.*

When the PUA was amended in 1997, the General Assembly developed criteria to determine whether there is sufficient competition to declare electric service competitive[15] and authorized the Commission to approve market-based rates for services that meet these criteria.[16] By structuring the transition to competition in this manner, the General Assembly allowed the "self-generating regulatory force" of the market to set rates where there is sufficient competition -- but retained regulated rates for those services that do not yet meet the criteria to be declared competitive. In the absence of competition, rates must continue to

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[13] On April 25,1871, the Illinois General Assembly approved "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State."

[14] In 1921 the Public Utilities Act of June 30, 1913 (Ill. Laws 1913), was repealed by the Public Utilities Act of 1921 (1921 Ill. Laws 702), which reenacted the general regulatory provisions of the former act in substantially the same form. The 1921 act has since been amended by, *inter alia,* P.A. 84-617 (eff. Jan 1, 1986), P.A. 86-1475, (eff. Jan 10, 1991); P.A. 92-22, (eff. 6-30-01); P.A. 89-42, (eff. 1-1-96); P.A. 90-561, (eff. 12-16-97); P.A. 91-50 (eff. 6-30-99); P.A. 92-537 (eff. 6-6-02); P.A. 92-690, eff. 7-19-02).

[15] P.A. 90-561 § 113(a), codified at 220 ILCS 5/16-113.

[16] P.A. 90-561 § 113(a), codified at 220 ILCS 5/16-103(c).

be determined by the Commission through a process of regulatory review defined by the PUA, rather than by passing through prices from wholesale or retail markets.

In the regulatory review process the Commission is required to determine whether rates proposed by electric utilities are "just and reasonable." *220 ILCS 5/9-101.* The Commission must also ensure that electric rates for a utility's captive customers are based on the actual cost[17] of providing service – and no more. *State Public Utilities Comm'n v. Springfield Gas & Electric Co., 291 Ill. 209, 217-18; 125 NE 891, (1919) (the public is entitled to demand that no more be exacted from it than the services rendered are reasonably worth).* "In setting rates, the Commission must determine that the rates accurately reflect the cost of service delivery and must allow the utility to recover costs prudently and reasonably incurred." *Citizens Utility Board v. Illinois Commerce Commission et al.; 166 Ill.2d 111, 121, 651 N.E.2d 1089, 1095 (Ill. 1995), citation omitted.*

Captive customers, who do not have access to service that has been declared competitive, have a right to the continued consumer protections afforded by the procedural and substantive standards that the General Assembly, the Courts and the Commission have articulated as essential elements of rate of return/cost-based regulation in Illinois:

- rates based on a review of the prudence of management decisions[18]

[17] The PUA specifies that "tariff rates for the sale of various public utility services are authorized such that they accurately reflect the cost of delivering those services and allow utilities to recover the total costs prudently and reasonably incurred". *220 ILCS 5/1-102 (a)(iv), emphasis added.*

[18] In *Business and Professional People for the Public Interest v. Illinois Commerce Commission, 279 Ill.App.3d 824, 831, 665 N.E.2d 553, 558 (1st Dist. 1996),* a case involving electric fuel reconciliation, the Court started with the dictionary definition of prudence, stating: "Two of the

- rates based on a direct review of profits[19]

- rates determined through public proceedings with procedural safeguards that ensure the right of the citizens to participate, investigate, present evidence, and cross-examine witnesses[20]

- rates determined to be just and reasonable through a deliberative decision-making process based on the evidence in the record and applicable law[21]

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dictionary definitions of 'prudence' are 'sagacity or shrewdness in management of affairs' and 'skill or good judgment in the use of resources.' Webster's Ninth Collegiate Dictionary 949 (1985)." The Court continued: "Those cases that have disallowed utility costs have focused on management planning and decision-making, not on individualized circumstances of human error as in the outages in this matter." *(Citation omitted) Id. at 832.*

In *United Cities v. Illinois Commerce Commission, 163 Ill.2d 1, 643 N.E.2d 719 (1994)* the Illinois Supreme Court held that the utility acted imprudently and demonstrated an indifference toward its [Illinois] customers, which resulted in excessive charges to Illinois (as opposed to Tennessee) ratepayers). The Court also noted that, "if, in a fuel reconciliation proceeding, the Commission could not examine the reasons that necessitated a fuel purchase, the prudence standard would have no effect on ensuring a just and reasonable rate as required" by the Act. *(Citation Omitted) United Cities v. Illinois Commerce Commission, 163 Ill.2d 1, 17, 643 N.E.2d 719, 727 (1994).*

[19] Illinois Courts have held that utilities cannot recover excess profits from consumers:

> The Commission has the responsibility of balancing the right of the utility's investors to a fair rate of return against the right of the public that it pay no more than the reasonable value of the utility's services. While the rates allowed can never be so low as to be confiscatory, within this outer boundary, if the rightful expectations of the investor are not compatible with those of the consuming public, it is the latter which must prevail.

Citizens Utility Board v. ICC, 276 Ill. App.3d 730, 736-737, 658 N.E.2d 1194, 1200 (1st Dist. 1995), q*uoting Camelot Utilities Inc. v. Illinois Commerce Commission, 51 Ill. App.3d 5, 10, 365 N.E.2d 312 (1977).* The just and reasonable standard is a key provision of the PUA that has historically protected captive customers from excessive and unfair prices: "the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests." Illinois Bell Telephone Co. v. Illinois Commerce Commission, 414 Ill. 275, 287, 111 N.E.2d 329, 336 (1953), quoting Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603, 88 L.Ed. 333, 345, 64 S.Ct. 281, 288 (1944).

[20] See, for example, the procedural rights set forth at 83 Ill. Admin. Code 200.

[21] See, for example, the requirement for just and reasonable rates found at 220 ILCS 5/9-101 -- "All rates or other charges made, demanded or received by any product or commodity furnished or to be furnished or for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. All rules and regulations made by a public utility affecting or pertaining to its charges to the public shall be just and reasonable."

- rates determined by an independent Commission whose ratemaking decisions are subject to scrutiny by the Courts[22] and can be reversed or voided for violations of the PUA and ethics laws[23]

Captive customers would lose most (perhaps all) of these consumer protections if their rates were set automatically by the market, rather than through a process of regulatory review by the Commission. This is a lot to lose. Unlike the Commission, markets are not required to consider the prudence of management decisions, excess profits, citizens' right to be heard, the justness and reasonableness of rates, the credibility and weight of evidence, or ethical problems. Unlike the Commission, markets are not required to ensure that the People of Illinois have access to "adequate, efficient, reliable, environmentally safe and least-cost public utility services *at prices which accurately reflect the*

See also, the provision providing for the decision to be based exclusively on the record found at 220 ILCS 5/10-103 -- "In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act..."

[22] See, for example, Business and Professional People for Public Interest v. Barnich, 244 Ill.App.3d 291, 614 N.E.2d 341, 185 Ill.Dec. 207, Ill.App. 1 Dist., Mar 31, 1993, in which the Appellate Court, held that: (1) judicial conduct principles imposed a duty on commissioner to recuse himself after his impartiality had been reasonably questioned on the basis of his friendship with representatives of electric company and allegations of a large number of ex parte phone calls; (2) allegations of the appearance of impropriety were sufficient to overcome a motion to dismiss for failure to state a claim; and (3) commissioner's duty to recuse himself was not discretionary and, thus, a writ of mandamus was an appropriate remedy.

[23] See, for example, the requirements set forth at 220 ILCS 4 and 83 Ill. Admin. Code Section 100 to ensure that "the business of the Illinois Commerce Commission is conducted effectively, objectively and without improper outside influence or appearance thereof. . ." *83 Ill. Admin. Code 100.10.* See, also, the State Officials and Employees Ethics Act, *5 ILCS 420*, and the Illinois Governmental Ethics Act, *5 ILCS 430*.

long-term cost of such services and which are equitable to all citizens." *220 ILCS 5/1-102, emphasis added.*

Fortunately, for captive customers, the General Assembly made clear, in Section 16-103(c), that consumers do not have to give up these protections until they have competitive choices in fully-functioning markets -- in which competition acts as a self-generating regulatory force. The utilities attempt to circumvent these requirements by imposing market-based rates on captive customers through the proposed Riders. The Riders must be rejected as a matter of law.

C. The ALJ Rulings wrongly suggest that Section 16-111(i) authorizes the Commission to approve the use of "market value" as a rate for service that has not been declared competitive.

The ALJ Rulings state that Section 16-111(i) of the PUA "provides for the consideration of costs in establishing rates for tariffed services subsequent to the mandatory transition period." *ALJ Rulings at 6 (ComEd and Ameren).* We do not disagree with this statement, provided it is not meant to imply that market prices can be automatically be passed through to rates *prior* to the time that a service is declared competitive under Section 16-113 of the PUA. However, the context in which this statement appears in the ALJ Rulings suggests that the ALJs have, in fact, concluded that market prices can be passed through automatically *prior* to the time that a service is declared competitive.

Section 16-111(i) does *not* authorize the Commission to simply pass through the market value, calculated in accordance with Section 16-112(a), to set retail rates for services that have not been declared competitive. To suggest

otherwise would be inconsistent with Section 16-103(c).[24] Rather, Section 16-111(i) directs the Commission to compare cost-based rates with the "market value" calculated using one of the methods listed in Section 16-112. This consideration of "market value" is simply one step in the process of determining the justness and reasonableness of the regulated rates charged to captive customers.

This is the only interpretation of Section 16-111(i) that makes sense when this section is read, as it must be, with Section 16-103(c). Basic rules of statutory construction require the Commission to "consider the entire statute and interpret each of its relevant parts together." *People v. Joseph Maggette*, *195 Ill. 2d 336, 348, 747 N.E.2d 339 (2001), Bonaguro v. County Officers Electoral Board, 158 Ill. 2d 391, 397, 199 Ill. Dec. 659, 634 N.E.2d 712 (1994); Castaneda v. Illinois Human Rights Comm'n, 132 Ill. 2d 304, 318, 138 Ill. Dec. 270, 547 N.E.2d 437 (1989); People v. Wallace, 57 Ill. 2d 285, 289-90, 312 N.E.2d 263 (1974).* "Even when an apparent conflict between statutes exists, they must be construed in harmony with one another if reasonably possible." *Knolls Condominium Association v. Mary E. Harms, 202 Ill. 2d 450, 458-459, 781 N.E.2d 261 (2002), United Citizens of Chicago & Illinois v. Coalition to Let the People Decide in 1989, 125 Ill. 2d 332, 339, 531 N.E.2d 802 (1988),* quoting *People v. Maya, 105 Ill. 2d 281, 287, 85 Ill. Dec. 482, 473 N.E.2d 1287 (1985).*

[24] As discussed in the previous section of this Reply, Section 16-103(c) authorizes the Commission's to approve market-based rates only for customers who have access to service that has been declared competitive.

When Section 16-111(i) is read together with Section 16-103(c), it is clear that Section 16-111(i) does *not* authorize the Commission to set market value-based rates for service that has not been declared competitive – it only authorizes the Commission to add a market value calculation to the various analytical screens used to determine the justness and reasonableness of the regulated rates charged to captive customers and to impose a discretionary cap (market value plus 10 percent) on rates charged to captive customers.

II. The ALJ Rulings should be reversed because they are based on a mischaracterization of a central premise in the Motions to Dismiss and an apparent misconception that an auction is the only viable post-2006 option.

The ALJ Rulings adopt the utilities' mischaracterization of a central premise in the Motions to Dismiss, thereby transforming a key argument in the Motion into a position that is patently absurd. The ALJ Rulings also imply that an auction is the only viable post-2006 procurement option. These errors are highly prejudicial to the captive customers who seek to dismiss the utilities' request for approval of Riders that would unlawfully impose market-based rates on consumers that do not have access to electric service that has been declared competitive.

A. The ALJs' mischaracterization of the central premise in the Motions to Dismiss must be corrected.

The ALJs erroneously suggest that the Motions assert that "the use of market-based prices is inherently inconsistent with the principle of setting rate components at cost." *ALJ Rulings at 6 (ComEd and Ameren)* This is simply wrong. Indeed, the Motions repeatedly note that Section 16-103(c) *mandates* the

use of market-based prices to determine the cost of services that have been declared competitive. *Motion to Dismiss in Docket No. 05-0159 at 3, 5, and 7; Motion to Dismiss in Docket No. 05-0160/61/62 at 4, 6, and 8.* Moreover, a central premise in the Motions is that the General Assembly's use of express language, in Section 16-103(c), to specifically authorize market-based rates for service that has been declared competitive necessarily indicates that the General Assembly intended to authorize market-based rates for service that has been declared competitive, but not for service that has not been declared competitive.

The use of market-based prices is not "inherently inconsistent" with the principle of setting rate components at cost *when the market-based prices are prices set in a competitive market.* In genuinely competitive markets, market prices closely track costs. That's basic economics – and, presumably, an essential reason that the General Assembly amended the PUA to authorize market-based rates *for services that have been declared competitive.* However, prices in markets that are not competitive – because, for instance, there are market power problems or the markets are simply too new to be fully-functioning – can often be far above cost. The General Assembly's decision to retain cost-based ratemaking for service that has not been declared competitive protects captive customers from paying prices that significantly exceed the cost of generating electricity – and prevents generators from making excess profits at the expense of customers who lack competitive choices.

This mischaracterization of the Motion is highly prejudicial. The Commission should correct the ALJs' error. The Motion should not be denied

on the basis of concerns about an argument that does not even appear in the Motion -- and which is inconsistent with the basic grounds set forth in the Motion.

B. The ALJs fail to recognize that the utilities have a responsibility to propose a post-2006 procurement method that complies with the PUA.

The ALJ Rulings state that "it is difficult to see by what means Movants envision the costs of procuring power and energy being determined for non-competitive services in a manner consistent with Movants' theory that market based prices may not be used to establish costs on which to base rate components for noncompetitive services." *ALJ Rulings at 6-7 (ComEd) and 7 (Ameren).* This statement fails to recognize that the responsibility to "envision" and propose a post-2006 procurement method *that complies with the PUA* falls squarely on the utilities, as an essential element of their service obligations under, *inter alia,* 220 ILCS 5/8. Proposing an auction that does not comply with the PUA does not fulfill that responsibility.

There are numerous alternatives to the proposed auction that meet PUA requirements. The most obvious alternative is the purchase of electricity through bilateral wholesale contracts with the utilities' low-cost generation affiliates. The utilities' suggestion that they are somehow precluded by FERC from pursuing this alternative is disingenuous and self-serving. *See, e.g., Commonwealth Edison's Response in Opposition to the Motion to Dismiss, at 2*.

FERC requirements for affiliate electric contracts are set forth in *Boston Edison Company Re: Edgar Electric Co.*, 55 F.E.R.C ¶ 61,382 (1991). *Edgar*

holds that where a utility affiliate seeks to sell wholesale power to a utility, it must show:

a. evidence of direct head-to-head competition between the affiliate and competing unaffiliated suppliers in a formal solicitation or informal negotiation process;

b. prices comparable to the prices that non-affiliated buyers were willing to pay for similar services from the affiliate; or

c. prices, terms and conditions of sales comparable to those accepted by the utility in contracts with non-affiliated sellers.

Wholesale competitive bidding, such as the auction, is only one of three options on this list – and is not a "better" option than the others. Indeed, FERC has recently indicated that these three options for demonstrating the reasonableness of an affiliate sale "were not an all-inclusive list; the individual facts of a case could bring forth other examples not expressed in *Edgar* to show that a transaction is without affiliate abuse." *Ameren Energy Generating Co., Union Electric Co., d/b/a AmerenUE*, *108 F.E.R.C. ¶ 61,081, at n.14 (2004).*

The utilities are responsible for selecting a post-2006 procurement method that complies with the PUA. The utilities have presented an auction proposal that does not comply because rates for captive customers would be based on the auction clearing price rather than the record in a rate case. The utilities' failure to propose a procurement method that complies with the PUA and the ALJ's inability to "envision" an alternative to the auction are not a valid basis to deny the Motion to Dismiss.

III. The Commission should reverse the ALJ Rulings and grant the Motions to Dismiss the utilities' requests for approval of the Riders.

The Commission should reject the ALJ's erroneous interpretation of Section 16-103(c), reverse the ALJ Rulings denying the Motion, and dismiss the utilities' requests for approval of the Riders. These Riders would unlawfully subject captive customers to rates determined automatically by the market, rather than through the process of regulatory review specified in the PUA. Consequently, the Commission lacks authority to approve the Riders and should, therefore, grant the Motion to Dismiss.

A. The Commission should reject the ALJs' erroneous interpretation of Section 16-103(c) and reverse the ALJ Rulings.

As discussed on pages 5-17, *supra,* it is clear that the ALJ Rulings fundamentally misinterpret Section 16-103(c) of the PUA. Section 16-103(c) authorizes market-based prices only for service that has been declared competitive pursuant to Section 16-113. There is no language in the PUA that authorizes market-based rates for customers who do not have access to electric service that has been declared competitive. The Commission should, therefore, reject the ALJs' erroneous interpretation of Section 16-103(c) and reverse the ALJ Rulings denying the Motions to Dismiss.

B. The Motions to Dismiss should be granted because the Commission does not have authority to approve the Riders.

The Commission does not have authority to approve the Riders because the Commission does not have authority to approve market-based rates for customers that have not been declared competitive pursuant to Section 16-113 of the PUA. The Commission does not have authority to subject captive

customers to rates determined automatically by the market. Captive customers are entitled to rates determined through a regulatory review process that balances the public's right to pay no more than the reasonable value for electric service and the utility's right to a fair, but not excessive, rate of return. The utilities' attempt to impose market-based rates on captive customers must be rejected, as a matter of law.

The Commission's authority is limited to that provided by Illinois law. It is well-established that ". . . the sole power of the Commission comes from the statute [PUA] and . . . it has power and jurisdiction only to determine facts and make orders concerning the matters specified in the statute." *Lowden v. Illinois Commerce Com. 376 Ill. 225, 230, 33 N.E.2d 430 (1941).* As a result of the 1997 Amendments to the PUA, this grant of authority has been expanded to allow the Commission to approve market-based rates for customers who take electric service that has been declared competitive. *220 ILCS 5/16-103(c).* The PUA does not, however, grant the Commission authority to approve market-based rates for customers who take service that has not been declared competitive. Since the Commission does not have authority to approve tariffs that violate the PUA, the Commission must reject these Riders, as a matter of law, and should grant the Motion to Dismiss.

CONCLUSION

Based on the foregoing, we respectfully request that the Commission: (1) reject the ALJs' interpretation of Section 16-103 of the PUA; (2) reverse the ALJ Ruling denying the Motion to Dismiss; and (3) dismiss the utilities' requests for approval of these unlawful Riders.

Respectfully submitted,

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